No. 3624.

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United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Louisa Pickens et al.,

Appellants,

vs.

J. H. Merriam et al.,

Appellees.

PETITION FOR REHEARING.

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To the Honorable, the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

The appellants respectfully and earnestly petition this Honorable Court for a rehearing and reconsideration of certain questions and points in issue in this cause, the most important and vital embraced in the issues therein, and which should be determined and which have not in any way been passed upon, determined or adjudicated, and without a determination thereof this cause has not been decided upon its most material features and issues, which are as follows:

First.

Whether or not the appellants and their co-heirs of Ferdinand Fensky became and were the heirs and only heirs of Jeanette Fensky, who died intestate as to her property in California, and as to whether or not they inherited from her whatever estate she left in California at the time of her death and that they thereby became and were the owners of such estate, which included the real estate and notes and other property hereinafter mentioned.

Second.

Whether or not Jeanette Fensky became and was the absolute owner of a large amount of real property and also of considerable personal property in California, all of which came to her by descent from Ferdinand Fensky and was his separate property at the time of his death and comprised the whole of her estate in California, and that the greater portion of it consisted of real estate of which she executed instruments in 1907 purporting to convey the same to her blood relatives, defendants in this action, but that said instruments were not delivered and were absolutely void and of no effect whatever. That she also wrote certain letters expressing her desire that certain promissory notes belonging to her should be given to certain of the same blood relatives at her death, but that none of said notes were delivered, and such attempted gifts *causa mortis* were void and of no effect and that said real estate and notes belonged to Jeanette at

her death and that none of said real estate or of said notes were ever included in but were absolutely excluded and concealed from any proceedings of administration of her estate and were not in any way treated as part of her estate by any or either of the defendants, and that such properties and also other property of her estate was diverted entirely from any such administration proceedings, and were wholly unaccounted for. That the claims of title of the defendants as purported grantees under the instruments above mentioned to the real estate described therein are invalid, and that their claims are clouds upon the title of appellants, who are the owners as heirs of Jeanette, and that the claims also under the alleged gifts *causa mortis* are also invalid and that appellants should be adjudged such owners and entitled to removal of the clouds and to an accounting from the defendants in the premises.

That these questions are actually and undeniably presented for determination as of the chiefest and most important of all questions, the record clearly shows. The complaint, on pages 18 to 20 transcript, defines the lands purported to be conveyed in the instruments; and on pages 23 and 24 the fact that the instruments and notes were not delivered and that the instruments and attempted gifts were void, and on page 25 the fact of title by descent to the appellants and their coheirs, and the prayer of the complaint in subdivision three is that an account be taken of the property in

the estate of Jeanette and appellants be declared the owners, and in subdivision four of the prayer that the defendants have no interest in the property, and in subdivision five that Merriam also account for the estate, and on page 29 of the transcript the prayer for general relief. In the amended complaint, see transcript pages 191 to 194; in the intervention complaint, pages 104 to 111, and in the prayer in intervention, pages 112 and 113, and in the answer of defendants, pages 47 to 53, and 121 to 126, and in the assignments of errors, pages 222 to 238, including assignments Nos. 50 and 52 on page 234, also assignments Nos. 72 and 73 on page 241, and Nos. 75 and 76 on page 242, and Nos. 79 to 82 on page 243. On the subject of gifts *causa mortis,* with authorities and appropriate references to transcript, see pages 170 to 174, appellants' brief, and upon Merriam's exclusion from administration of these lands and other concealed assets of estate of Jeanette, see pages 174 to 185 of said brief, with appropriate references to transcript and with authorities in said appellants' brief. Moreover, express recognition was announced in the former appeal of the alleged rights of appellants in this case as reported in 242 Fed. Rep. 363, upon the omitted subject matters herein discussed, and it was there distinctly announced in favor of appellants, as the law of this case to be followed thereafter to its end, to the effect that if the allegations of the complaint with respect to the relationship of appellants to the estate of Jeanette as such heirs were true, and the alleged instruments, so-called

deeds signed by Jeanette, and the alleged gifts *causa mortis* were not delivered, the appellants, on proof of such facts, would be entitled to a decree in their favor that they were the owners of said land and property and were entitled to an accounting in the premises. Furthermore, defendants in their brief, and also in their oral argument, in response to the oral argument of appellants upon that matter, recognized and argued and agreed with appellants that these matters were vital in the case to be determined, and they attempted in their brief to controvert the propositions of law involved, as presented by appellants, upon those matters. Fully one-half of their brief is an attempted refutation of the facts and law upon these very questions, which have not been determined by this Honorable Court.

In this connection we call the attention of the court to the following equity rules. These rules, however, express the well-known general rule prevailing in a court of equity, but, as such rules they have the effect of law to govern the case:

> "Equity Rule 23. 'MATTERS ORDINARILY DETERMINABLE AT LAW, WHEN ARISING IN SUIT IN EQUITY TO BE DISPOSED OF THEREIN. If in a suit in equity a matter *ordinarily determinable at law* arises, such matter *shall be determined in that suit* according to the principles applicable, without sending the case or question to the law side of the court.' "

"Rule 72. CORRECTION OF CLERICAL MISTAKES IN ORDERS AND DECREES. (Clerical mistakes in decrees or decretal orders, or errors arising *from any accidental slip or omission,* may, at any time before *the close of the terms at which final decree is rendered,* be corrected by order of the court or a judge thereof, upon petition, without the form or expense of rehearing.) (85 Rose's Code, #1092.)"

This court has already decided, and very properly so, that whatever property Jeanette owned came to her by descent from Ferdinand, and such property embraced not only all the property that came by descent from him directly to herself, but also the remainder of his estate which descended direct to the appellants and their co-blood heirs from Ferdinand and which they quit-claimed their interest in said estate of Ferdinand to Jeanette, for it is apparent that the record shows she paid the moneys, which she derived by direct descent to her from Ferdinand, to the purchase of those interests embodied in those quitclaims and consequently those interests were the fruits and investments of that which came to her originally by such descent, and are, of course, to be considered as though those interests had come direct to her from Ferdinand by descent, in like manner as though it had been other and different property in which she had invested the money, and which property, of course, would still retain the characteristics of property coming to her by descent from Ferdinand direct to her.

Therefore, all the property that she had came to her by such descent from Ferdinand, as this court has properly decided.

Such being the case, the law of descent in California at the time of her death is clear and explicit and establishes as correct the contention of appellants that all of this property which came so by descent to Jeanette passed instantly at her death by descent from HER and from HER ONLY to these appellants and their co-blood heirs and they became thereupon instantly the absolute owners of it, inasmuch as originally the property which so descended to Jeanette *was the separate property of Ferdinand when he died.* This is by the provisions of 1386 Civil Code, subdivision 8 (see page 151, brief of appellants). This title of appellants was and is as absolute as though these appellants had been the children of Jeanette and had taken by direct descent from her as her children; therefore these appellants are the owners in fee simple of those lands. There is no possible escape from that conviction. Upon this question see pages 148 to 154, appellants' brief. Bear in mind that *"Successions to estates is purely a matter of statutory regulation which cannot be changed by court,"* as held in Estate of Nigro, 172 Cal. 477.

From the fact that this court in its opinion has incidentally stated that it did not concern the appellants as to what Jeanette did with her property, it is pure matter of conjecture on our part as to *why* it did not concern the appellants, according to the opinion of the court, unless that opinion was based upon an as-

sumption that the quitclaims made by the appellants several years before the death of Jeanette, of their interest in the estate of Ferdinand (those quitclaims being sustained by the court), should be construed as extending to and embracing the interests of appellants in the estate of Jeanette, as though they had been derived by them by descent as his heirs and as by descent from him and not as by descent from her (Jeanette). We can only surmise that possibly *that* was the assumption of the court, as being based upon the characteristics of the property of the estate of Jeanette as having been originally in the estate of Ferdinand, as to certain of it and as to the remainder, the fruits thereof. Of course, if this was the assumption of the court it was an erroneous one because the inheritance and heirship of the appellants to the estate of Jeanette was from HER and HER ONLY, and those quitclaims had no relation to such inheritance, and inasmuch as she had a right to do as she pleased with her own property and, as appellants contend, that she did nothing with it, but that on the contrary all of her attempts to do anything with it in the way of transfer by the purported deeds and the purported gifts *causa mortis,* because of non-delivery, were absolutely void and of no effect whatever, it necessarily follows that she died the owner of these properties and that the appellants were HER heirs and HER HEIRS ONLY and INHERITED that property from HER ONLY. See Estate of Watts, 179 Cal. page 23, where we give a quotation from it, subdivision 8 of section 1386, Civil Code.

> "That subdivision is as much a part of the law of descent as any other, and those who inherit under it TAKE AS HEIRS OF THE DECEDENT WIDOW OR WIDOWER, NOT as heirs of the pre-deceased spouse."

To the same effect the

Estate of Hill, 179 Cal. 683.

See also the other cases on the succession to property on pages 148-154, appellants' brief.

The instruments, so-called purported deeds, were certainly not delivered, and were absolutely void and of no effect. They embraced nearly the whole of the property, in point of value, of the estate of Jeanette, and certainly exceed fifty thousand dollars in value, and, as they were absolutely void, those properties certainly formed a part of her estate at the time of her death and passed to these appellants and their co-blood heirs, and they became the owners thereof.

It is well and proper at this juncture to inquire and consider into the situation of appellants when they brought this action, they having then for the first time acquired information of the possible means of proof of the non-delivery and voidness of those alleged deeds. They knew that whatever they could recover by an action must necessarily be from and of the estate of Jeanette, and they believed and had a right to believe, and as the law ordained, that if they could succeed in proving that the instruments were not delivered, that

of course the lands formed part of her estate and the major part, and that they became the owners by descent and inheritance from her and the owners, in such a case, but the uncertainty of being able to prove it, which if they could succeed in proving, would give them absolute title to all of her estate, actuated them at that time in the bringing of this action, not only to seek to be declared the owners by descent from her of these lands and of the personal property, but also to seek to impress upon the estate of Jeanette the constructive trust arising out of the setting aside of the quitclaims of the interest in the Ferdinand estate, and so as to impress that trust upon the estate of Jeanette and upon those lands included in those purported deeds which were claimed to be void for non-delivery, and upon those gifts *causa mortis,* void for the same reason, and upon other property of her estate not accounted for, in the event that upon the trial of the action the appellants should unfortunately fail in proving the non-delivery of the purported deeds and the non-delivery of the gifts *causa mortis,* or that for some reason the law might possibly and unexpectedly be declared as though they had not become the heirs of Jeanette as they contended they were. That is the only reason why this action included the attempt to impose this constructive trust; namely, to impose it upon the estate of Jeanette if it should so result that for lack of proof on the trial the appellants failed to become the successors of her estate, including the property in the purported deeds, which embraced nearly

the whole value of the estate; for it is evident that it would have been ridiculous to obtain a setting aside of the quitclaims and thus to successfully impose a constructive trust in their own favor upon their own property of which they became the absolute owners by descent from Jeanette, a result which would be simply farcical, and nothing less than that. So, insofar as that constructive trust is concerned, if it had been imposed and the quitclaims set aside, it would have been of no consequence and of no effect whatever, if this court had decided the main questions in the case which involved the question of descent from Jeanette to appellants, the non-delivery and voidness of the instruments and gifts mentioned, and had determined that appellants were the owners of these properties by descent from Jeanette, inasmuch that the trust thus imposed in favor of appellants would have been imposed upon their own property. Quite otherwise would have been the effect of setting aside the quitclaims and imposing the constructive trust if the court had decided that the instruments (the purported deeds signed by Jeanette) were delivered and were valid, and the so-called gifts *causa mortis* were delivered and were valid, or that appellants were not the heirs of Jeanette, for in that case the trust would have been imposed on the property of others and not on the property of appellants, so we see the seeking of an imposition of this constructive trust was, under the circumstances, a justifiable measure of precaution on the part of appellants to seek to have the imposition of it on the prop-

erty of others if, unfortunately and unexpectedly, because of a lack of proof upon the trial, the appellants had failed to prove and establish their ownership of that property. It is perfectly right to contemplate the position of the complainants held at the outset of this action, and hence we see that where the appellants have established their title and ownership to all of the property of Jeanette, including the real estate mentioned, the question as to whether or not the quitclaims in the Ferdinand estate were void and should be set aside and the trust imposed is of no consequence whatever one way or the other, for it could neither add to nor detract from the title and ownership of appellants, as heirs of Jeanette. It is a mere minor question in the case, and whilst much space was absorbed in the record with respect to the setting aside of the quitclaims, it only became necessary in that respect because of the mass of the correspondence and evidence on the subject, but disproportionate to the length of the record on that subject is the insignificance of the subject itself, as the court will see, and yet it has monopolized the attention and decision of the court and has been treated by the court in such a way as to exclude entirely the main question of ownership.

Now, one of the main questions is, what estate did Jeanette leave at her death of which she was the absolute owner, and which during her lifetime she obtained by descent from Ferdinand of his separate property either in kind or as fruits thereof; for those are the

properties of which the appellants and their co-blood heirs became the owners and are now the owners as her heirs, the major portion of which are the lands included in those purported deeds which are absolutely null because not delivered? With regard to them the appellants were indeed fortunate to be able to prove and did prove conclusively that they were not delivered, that although signed by her and acknowledged before Mr. Parmele, as notary, in the presence of her real estate agent, Ferguson, yet that she contemporaneously directed the latter to sell the property described in the papers, to handle it just as if the papers had not been given, and to record the instruments of such property *as she owned or might own at the time of her death,* and meanwhile to continue to control and have charge of the property. That afterwards she sold one of the properties through that same agent and made a deed to the purchaser. These instructions positively show that she *retained the power to sell any or all of the property; to recall the instruments, any or all, into her own manual possession at any moment; to control at all times the efficacy of the instruments,* and that she did exercise that power as to one instrument, and that her instructions were those which indicated that *none* of the instruments were to take effect whatever in any event except as to her property *which she might own or which she did own at the time of her death, and as to those, only to take effect at her death.* Now, it is very evident that any property which she owned at the time of her death would have to go by descent or by

will and could not go by deeds, and notwithstanding that she evidently construed these instruments as that they might be efficacious like unto her will, yet her mistaken ideas as to their legal effect as such could not give any legal effect to them or any different effect than what the law gives their legal effect, if any, which was simply that they were absolutely void and of no effect. It is needless to exhaust time upon a subject so clear as this. Parmele was the notary. He was entirely disinterested; his evidence is clear, as shown upon pages 155 to 157 in the argument or brief of appellant, and in pages 510 to 516 of the transcript. The only other evidence was that of Ferguson, the real estate agent, on pages 565 to 567 of the transcript. He was merely the bailee of Jeanette and solely the agent of Jeanette, and his manual possession was her possession also, and his evidence confirms that of Parmele; the only other evidence was Minnie Farnsworth, on page 623 of the transcript, and all she testified was that she did not hear the instructions that the other two witnesses mentioned testified were positively and clearly given, as hereinabove stated and as shown in the transcript, and as embraced in the argument supported by authorities in the appellants' brief, pages 154 to 164, and we here particularly call the attention of the court, among the other authorities, to the case of Stone v. Daily, 58 Cal. Decs. 462-468, as shown on page 161 of that brief, which decides that where the right or power to recall the instrument or to control its efficacy existing, is not a delivery, and the

case of Williams v. Kidd, 170 Cal. 631, 637, on page 158 of that brief. There was no contrariety in the evidence upon the non-delivery of those instruments, no question of fact at variance. It is therefore simply a question of law upon the evidence or fact which is established that there was no delivery, and that the instruments were absolutely null.

And now what we have said with respect to these worthless so-called deeds is equally applicable to the alleged gifts *causa mortis* of the Stein and Campbell notes, which were not delivered, and the authorities upon this question will be found in pages 165 to 174 of the appellants' brief.

So, may it please the court, according to our view, the all-important questions of the case, as hereinabove set forth, have been left undetermined, and only one question, and that of minor importance, has been passed upon in the decision, and we here have endeavored to so present our views as that this court will appreciate the situation and accord the rehearing and reconsideration prayed for and will determine these questions left undecided, for if those so-called deeds are void for non-delivery, or those so-called gifts *causa mortis* are void for non-delivery, the appellants having inherited all the property of Jeanette, and those properties being her property at her death, it follows that the appellants are the owners of it, and the owners by a NEW AND INDEPENDENT TITLE AS OF THE DATE OF THE DEATH OF JEANETTE, entirely and utterly free from

the effect of any quitclaims of their interest in the estate of Ferdinand, to an absolute certainty.

The decision in Pickens v. Merriam in this cause, in 242 Fed. Rep. 363, has already established the law of the case that these properties, excluded and concealed from any administration proceedings, should be accounted for by the defendants. See upon this question of accounting, with authorities, pages 222 to 228, appellants' brief, and on pages 210 to 216, same brief. Even as to the small amount of property involved in the attempted accounting and attempted distribution of the estate of Jeanette, that proceeding was void for want of jurisdiction, although the amount is very small and hardly worth mentioning. See pages 193 to 210, appellants' brief.

If appellants had brought their action based solely upon their ownership as heirs of Jeanette, confined solely to that and for the purpose of recovering the property of her estate, it is certain that the cause could not have been decided unless the court had specifically determined such ownership question, nor, in such case, would a bare statement in the opinion or decision suffice which was confined to a recital that inasmuch as Jeanette had a right to do as she wished with her own property and that it did not concern the complainants what she did with it, unless in the decision reasons for such statement were given and thereby deciding whether or not she did transfer the property or whether or not she was the owner of it at the time of her death and formed part of her estate, and whether

or not the complainants inherited such property from her and became the owner thereof. These remarks are equally applicable to the case at bar, for it is certain that the mere incorporation in this action of the seeking to set aside those quitclaims of the interests in estate of Ferdinand and of the imposition of such constructive trust on the estate of Jeanette did not deprive complainants of their right to determination of such ownership. There was no misjoinder of causes of action in the suit at bar, but, on the contrary, it is an equity case, which requires a full decision on all matters, and it is also certain that appellants are here with clean hands and are entitled to the specific determination of the questions thus omitted and undecided, and, as we contend, are entitled to a decree in their favor as owners of the land and other property mentioned, and to an accounting.

Of course, as this court has properly decided, the lands and notes and other property belonged to Jeanette absolutely as her own property, to do with as she saw fit, but the fact is that she did nothing with them and that her attempts to transfer them to the defendants, her own blood relatives, by gifts, through the worthless non-delivered so-called deeds and alleged gifts *causa mortis,* were absolutely of no effect whatever, and hence these lands and other property belonged to her as her absolute property at the time of her death, and she left no will, and consequently it is positively certain that they passed instantly at her death to the appellants and their co-heirs in absolute

title and ownership, derived by inheritance from her, *and it is manifest that it is of vital concern to these appellants, being such owners, that the invalid and worthless claims of the defendants be declared void and that appellants be adjudged the owners of those lands and property*, and we feel confident that the court, upon this reconsideration, will decide such ownership to be in the appellants and that it will afford the appropriate equitable relief sought by them, by removal of the clouds and by directing an accounting to be had.

The omission to decide these questions presents a case of peculiar gravity and of general importance.

And now, with these remarks, appellants invoke a decision upon the above matters mentioned and respectfully submit this to the careful consideration of Your Honors, and ask for a reversal of the decision and judgment heretofore given.

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I, Francis G. Burke, do hereby certify that I am counsel for appellants in the foregoing entitled cause, and that in my judgment as such counsel, the foregoing petition for rehearing is well founded and that it is not interposed for delay.

FRANCIS G. BURKE,
Counsel for Appellants.